"When, therefore, Florida had been ceded and fully transferred to the United States, its ports were regarded as foreign within the meaning of our revenue laws. (*Fleming et al v. Page*, 9 How. 617.)

"This being so, it seems to me we should be able to find some provision in the resolution annexing the Hawaiian Islands indicating an intention to change the relations of our tonnage-tax laws to Hawaiian ports and vessels coming from them, or those relations should be regarded as continuing.

"Such an intent I do not find in the general declaration annexing the islands as part of the territory of the United States. That declaration, there having been no treaty, is intended to have the effect of a treaty of cession merely. It is the act whereby the islands become, in a broad sense, subject to American sovereignty. How that sovereignty will regulate their status, with regard to itself and its laws, is not thereby intended to be determined.

"Neither do I think that the express declaration that our land laws and certain other laws shall not apply to the islands carries the implication that other laws shall apply to them upon the principle, often misunderstood, that the expression of one thing often excludes another.

"On the other hand, the resolution is replete with indications that temporarily the relations of the two countries are to continue practically unchanged. Even some of Hawaii's relations with other countries are so to continue; its government is still to exist and collect its revenues; its laws are to remain in force, however at variance with our laws, and the powers—civil, judicial and military—exercised by its officers are still to be exercised. It is, moreover, plainly apparent that Congress regards the establishment of an American government for and the extension of American laws to the islands as matters to be attended to in the future upon a consideration of the wide separation of the two countries in locality and character."

And in a later opinion, *Ib.* 249, referring to the former opinion, he says:

"And I reach the conclusion in that opinion that Congress in respect to this and other questions has affirmatively indicated its intent that our laws (and I may now add the Hawaiian laws) are to remain generally undisturbed by the annexation of the islands until 'Congress shall provide a government for such islands' or until a commission shall advise and Congress enact 'such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.'"

The other question is one of constitutionality. This is a question of great difficulty. Probably it will never be regarded as settled until decided by the Supreme Court of the United States. As pointed out in the *Peacock* decision jurists differ widely in their views upon it. I shall not now undertake an exhaustive consideration of the question.

Not to make too minute a classification, territory acquired by the United States may be in any one of three stages before attaining the status of statehood. It may be acquired by conquest and ruled by military government before a treaty of peace and cession is concluded, as was the case with the Philippines for a time. It may be held after such treaty of peace and cession, as are the Philippines at present, or after cession without previous conquest, as were the Hawaiian Islands during the transition period referred to, without a determination of its status by Congress. And, thirdly, it may be held, as the Hawaiian Islands are now held, after its status has been determined by Congress by the creation of an organized territorial government or otherwise. The question now raised is that in regard to territory in the second of these stages.

It is conceded by all that the constitutional provisions in question do not apply to territory of the United States in the first of these stages.

As to whether they apply of their own force to territory in the third stage, jurists are divided. This has never been settled by judicial decision, although *dicta* may be found on both sides. The Supreme Court of the United States in so recent a case as that of the *American Publishing Co. v. Fisher*, 166 U. S. 464, (1896) said: "Whether the Seventh Amendment to the Constitution of the United States," which was held to require unanimous verdicts in certain cases, "operates *ex proprio vigore*" in the territories, "may be a matter of dispute;" and various previous opinions of the court, some pointing in one direction, some in the other, were cited to show the uncertainty upon the question so far as authority is concerned. It will be useless to review these *dicta* or the opinions of writers upon this subject. The question has called forth much discussion in the magazines during the last two years in view of the acquisition of islands in both the Atlantic and Pacific oceans teeming with peoples who in large measure are unacquainted with Anglo-Saxon ideas of civilization and government. As one example of the view that the Constitution does not apply *ex proprio vigore* in all its fulness to the territories I will cite the following passages from the speeches of that great authority on constitutional law and defender of the Constitution, Daniel Webster, in his debate with Mr. Calhoun, in the Senate of the United States, with reference to California and New Mexico, when those territories were in the second of the above mentioned stages, that is, after they had been ceded to the United States by treaty:

"My idea is, that the government, for the present, must be substantially a military government; that we can hardly do more than keep the peace, and protect the lives and property of individuals, until we either admit the people, who are freemen, as a State into this Union, or give them a regular Territorial government.

* * * * * *

"There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, and especially professional and judicial gentlemen. It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty, are extended by force of the Constitution itself over every new Territory. That proposition cannot be maintained at all. How do you arrive at it by any reasoning or deduction? It can only be arrived at by the lowest of all possible constructions. It is said this must be so, else the right of the *habeas corpus* would be lost. Undoubtedly these rights must be conferred by law before they can be enjoyed in a Territory. Sir, if the hopes of some gentlemen were realized, and Cuba were to become a possession of the United States by cession, does anybody suppose that the *habeas corpus* and the trial by jury would be established in it by the mere act of cession? Why more than election laws and the political franchises, or popular franchises? Sir, the whole authority of Congress on this subject is embraced in that very short provision that Congress shall have power to make all needful rules and regulations respecting the Territories of the United States. The word is Territory; for it is quite evident that the Constitution looked to no new acquisitions to form new Territories. We have never had a Territory governed as the United States are governed. The legislature and the judiciary of Territories have always been established by a law of Congress. I do not say that, while we sit here to make laws for these Territories, we are not bound by every one of those great principles which are intended as general securities for public liberty. But they do not exist in Territories till introduced by the authority of Congress. These principles do not, *proprio vigore*, apply to any one of the Territories of the United States, because a Territory, while a Territory, does not become a part, and is no part of the United States. * * *

"How did we govern Louisiana before it was a State? Did the writ of *habeas corpus* exist in Louisiana during its Territorial existence? Or the right to trial by jury? Who ever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one. And I do not believe that there is any new light now to be thrown upon the history of the proceedings of this Government in relation to that matter. When new territory has been acquired it has always been subject to the laws of Congress, to such law as Congress thought proper to pass for its immediate government, for its government during its Territorial existence, during the preparatory state in which it was to remain until it was ready to come into the Union of the family of States. * * *

"According to the gentlemen's reasoning, the Constitution extends over the Territories as supreme law, and no legislation on the subject is necessary. This would be tantamount to saying that, the moment territory is attached to the United States, all the laws of the United States as well as the Constitution of the United States become the governing rule of men's conduct, and of the rights of property, because they are declared to be the law of the land—the laws of Congress being the supreme law as well as the Constitution of the United States. Sir, this is a course of reasoning that cannot be maintained. The crown of England often makes conquest of territory. Who ever heard it contended that the Constitution of England, or the supreme power of Parliament, because it is the supreme law of the land, extended over the territory thus acquired, until made to do so by a special act of Parliament? The whole history of colonial conquests shows entirely the reverse. Until provision is made by act of Parliament for a civil government, the territory is held as a military acquisition. It is subject to the control of Parliament, and Parliament may make all laws that they deem proper and necessary to be made for its government; but, until such provision is made, the territory is not under the dominion of English law. And it is exactly upon the same principle that Territories coming to belong to the United States by acquisition, or by cession, as we have no *jus coloniae*, remain to be made subject to the operation of our supreme law by an enactment of Congress." Curtis' Life of Daniel Webster, Vol. II., pp. 362, 365, 369.

Mr. Webster and associate counsel had previously taken the same position in their argument in the case of *American Ins. Co. v. Canter*, 1 Pet. 533, 538. Mr. Calhoun, of course, in the debate referred to, took the opposite position.

Even assuming that Congress in the exercise of its legislative power over organized territories is subject to fundamental limitations respecting personal rights, it would not necessarily follow that the provisions respecting grand juries and unanimous verdicts apply directly to such territories or even that they apply at all. Congress might be so limited only by general inference from the Constitution and the free and enlightened government of which it is the basis, and, if so, it would be limited only in so far as required by fundamental rights, to which class of rights the rights in question may not belong. As to limitations by inference rather than directly, the court in *Mormon Church v. U. S.*, 136 U. S. 1, said:

"Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives its powers, than by any express and direct application of its provisions."

And as to whether the rights in question are among the fundamental rights, *Holden v. Hardy*, 169 U. S. 366, may be cited. In that case, while the court said, much as in the *Mormon Church* case, "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence," yet it also said that "the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary;" that "in several of the States grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority;" that, quoting from a former decision, "while we take just pride in the principles and institutions of common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown;" that "there is nothing in *Magna Charta*, rightly considered as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age;" and then, in the light of the foregoing, the court added this significant language:

"In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy."

In other words, the court considered indictments by grand juries and convictions by unanimous verdicts as matters of procedure rather than of fundamental right; and in holding, as it has held, that indictments by grand juries are not required in the States by the Constitution, even in murder cases, *Hurtado v. California*, 110 U. S. 516, *Bolln v. Nebraska*, 176 U. S. 83, and in apparently acquiescing in the view that verdicts by eight of the twelve jurors could be lawfully received in the States, even in criminal cases, *Thompson v. Utah*, 170 U. S. 343, it took the position that the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard" were not violated. The latest (January 15, 1900) expression by the Supreme Court of the United States upon this question is one of uncertainty—"whatever be the limitations upon the power of a territorial government"—uttered with reference to the power to permit prosecutions for felonies without indictments by grand juries. *Bolln v. Nebraska, supra.*

I am aware that it has been held that the provisions in question apply *ex proprio vigore* to the District of Columbia, or at least to congressional action with reference to such District. *Callan v. Wilson*, 127 U. S. 540; *Capital Traction Co. v. Hof*, 174 U. S. 1. The decisions in these cases go far to support the same view with reference to the territories, although the earlier decision was based in part upon the assumption, which has been shown above to be erroneous, that such had been decided with reference to the territories, and the later decision was based upon the earlier, and in the opinion of some writers the District of Columbia may be distinguished from the territories, especially those acquired after the adoption of the Constitution, with reference to the application of the Constitution. But assuming that there is no such valid distinction, still these decisions do not affect the present question, which relates to territory whose status has not been determined.

It is true also that it has often been held that these provisions of the Constitution were in force in the territories, but only because Congress had in each instance expressly provided, as it has now provided in the case of Hawaii, that the Constitution should have the same force and effect in the territory as elsewhere in the United States. I do not wish to be understood from the foregoing as being of the opinion that the constitutional provisions in question would not extend to the organized territories in the absence of an act of Congress in terms extending them. Indeed, I believe that so far as *dicta* are concerned they support the view that such provisions would so extend more strongly than the opposite view. The mere fact adequately shown in an appropriate manner that Congress has determined the status of the territory as an organized territory of the United States or as fully incorporated for all purposes as a part of the United States may be sufficient in itself. I express no opinion upon this point. What I do believe is that the question of the extension of such provisions of their own force to even organized territories has never been judicially decided and is generally regarded as not having been settled. But whatever may be the decision, if a decision is ever made, as to whether these provisions of the Constitution extend of their own force to organized territories, that is not the question here presented.

The question here presented is whether these provisions apply of their own force to territory of the United States in the middle of the three stages above mentioned—territory acquired but whose status has not been determined by Congress.

Upon this question some *dicta*, but no decisions, are cited in support of the view that the constitutional provisions in question do extend to territory under such circumstances. These *dicta* are for the most part entitled to little or no weight, partly because they are of a general character and uttered with reference to territory not in this stage but in the third stage above mentioned, or with reference to other questions than those here involved, and partly because as many and as satisfactory *dicta* of the same general character may be found on the opposite side. Such *dicta*, on which ever side found, are entitled to little weight except as read in the light of the facts and the questions involved in the cases in which they were uttered. For instance, the following recent language of the United States Circuit Court of Appeals for this Circuit, in *Endleman v. U. S.*, 86 Fed. 456, (1898,) although on its face pointing strongly in the direction that the provisions of the Constitution do not extend to the territories, has but little bearing on the present case:

"The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well-established doctrine that the territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department and subject to its supervision and control. *Benner v. Porter*, 9 How. 235, 242. The United States, having rightfully acquired the territory, and being the only government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, federal and state."

Nor is the opinion, often expressed, that Congress in legislating for the territories has the combined powers of the federal and of a state government, entitled to much weight in this connection, although if taken literally it would mean that Congress might do away with grand juries and unanimity of verdicts in the territories, for it is well settled that this may be done by a state government.

The United States are a sovereignty. It has under the Constitution power to acquire territory by conquest, treaty or act of Congress. The purposes for which, the extent to which, or the manner in which it may acquire territory are not limited by the Constitution. The sovereign power to acquire territory carries with it the incidental powers usually exercised by sovereignties in similar cases one of which incidental powers is the power to allow the newly acquired territory to remain for certain purposes foreign and not to regard it as at once put upon the same footing as other territory. This is the basis of the decision in the *Peacock* case. This power is not in derogation of the Constitution, nor does its exercise operate as a suspension of the Constitution. It is a power granted by the Constitution. It is founded on necessity and is granted by implication by the Constitution because a grant of the principal carries with it the incidental, and the Constitution was framed by reasonable men and with reference to established and known principles, and must be construed with reference to such principles. This ground was gone over at length in the *Peacock* case and decisions as well as *dicta* and historical precedents were there adduced in support of it. There is no need of repetition here. It is supported by the practice of the executive department of the government in the numerous cases of annexation that have occurred since the adoption of the Constitution. It is supported by the treaties and acts of Congress by which territory has been acquired, and which were framed on that theory, as well as by subsequent acts of Congress determining the status of the acquired territory, which also have been framed on the theory that the existing laws of the acquired territory relating to internal relations had continued unchanged after annexation until further action by Congress. It is supported by the express language of the Constitution itself,